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NO. 199 [redacted]

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

SAM FRANK URBANA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Sam Frank Urbana, respectfully prays, that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Fifth Circuit.

Opinion Below

The opinion below was handed down on June 26, 1969, (412 F.2d 1080), reversing and remanding the case for hearing as to the issue on wiretapping. The court below affirmed the conviction as to other points raised. The opinion is reprinted hereto as Appendix A and is reported,

United States v. *Urbana*, 412 F.2d 1080. The order denying petitioner's request to file instanter a Petition for Rehearing was entered on April 9, 1970.

Jurisdictional Statement

The jurisdiction of this court is invoked under Title 28, U. S. Code, Sec. 1254(1).

Questions Presented For Review

1. May a conviction for causing to be transported in interstate commerce two falsely made and forged travelers' checks stand when the trial judge did not instruct the jury on the essential elements of either of the statutes with which the petitioner was charged, and when the trial judge neither read the indictment nor the charging statutes to the jury at instruction time.

2. Was it not plain error for the court to omit the above essentials?

Statutes Involved

Sec. 2, Title 18, U. S. Code is as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Sec. 2314, Title 18 U. S. Code, in pertinent part, is as follows:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeit securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited . . . (shall be fined or imprisoned).

History of the Case

Upon conviction of a two-count indictment charging petitioner with causing to be transported in interstate commerce two forged and falsely made travelers checks, each in the amount of $100, in May, 1967, in violation of sections 2 and 2314, Title 18 U. S. Code, petitioner appealed to the Fifth Circuit Court of Appeals on three separate grounds. The Court of Appeals ruled adverse to petitioner's contentions on two of the grounds, and as to the third ground, whether admitted governmental eavesdropping contaminated the evidence, remanded the case for a hearing and a new determination. *United States v. Toussie*, 412 F.2d 1081.

The trial judge afforded a full and sweeping hearing in connection with the issue of wiretapping and concluded that the evidence was in nowise contaminated by governmental eavesdropping. The court instituted a new judgment of guilty and resentenced the petitioner to the same four year sentence as the first time around.

Petitioner appealed that ruling to the Fifth Circuit Court of Appeals under No. 28934. Petitioner moved the Fifth Circuit Court of Appeals to consolidate that case with the earlier numbered case No. 26446, and further moved to permit the filing of a Petition for Rehearing in case No. 26446 on the issues to which the court had ruled adverse to petitioner's contentions. The Court of Appeals denied the motion to consolidate and denied petitioner's motion for leave to file its petition for rehearing.

Statement of Facts

The government's evidence showed that some travelers checks corresponding to Gov't Exhibits 1 and 2 were missing from a bank in Detroit, Michigan, which had issued

such traveler's checks. On May 10, 1967, petitioner was identified by two government witnesses as having passed to each of them a traveler's check in the amount of $100. One of the witnesses, a Mr. Pieman, was not positive that petitioner was the person. (Tr. 75). Although the other witness, a Miss Sandra Calhoun, identified the petitioner as the one who cashed the money order, an FBI agent testified she could not identify the petitioner from photographs shown to her. (Tr. 191).

In instructing the jury, the trial judge never told the jury the essential elements it had to find were proven in order to return a verdict of guilty. Neither did the judge ever inform the jury as to the pertinent language of the statutes of which defendant was charged with violating.

Reasons Relied On For The Allowance Of The Writ

It was plain error not to instruct the jury on the essential elements of the crimes with which petitioner was charged, and it was plain error to omit to read to the jury the statutes under which defendant was charged.

Of most singular moment in a jury trial is the requirement that the judge advise the jury the essential elements necessary to be found before a guilty verdict could be returned. And equally, the jury must be advised of the particular law of which defendant stands charged. This trial judge never did.

Simply put, the jury was never informed that there must be evidence that the securities in question had to be transported across State lines; nor was the jury ever told by the court that such acts had to be instituted with unlawful and fraudulent intent. The jury which convicted the defendant never heard the definition of a falsely made or forged security. And the jury was not told that the falsification must relate to the execution and not to the content of the security. It never was advised by the judge that unlawful and fraudulent intent was an essential element of the crime. Nor was it told what criteria should be applied to determine such intent. And the fact that good faith or implied authority were valid defenses were never brought to the jury's attention.

The indictment contained an allegation that the petitioner violated Sec. 2 of Title 18, U. S. Code. That section was never read to the jury; nor was it ever advised by the court what elements constituted aiding and abetting. This omission assumes added significance because the government brought forth an expert witness to testify that the signatures appearing on each of the two traveler's checks were written by the same person; but, importantly, the expert did *not* testify that the signatures were written by the defendant. (Tr. 131).

It is a fundamental rule of criminal law that the court must instruct on all elements of the crime with which a defendant is charged, regardless whether defense counsel requested so or not. This court so held in its reversal in *Screws* v. *United States*, 325 U.S. 91. "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion." 325 U.S. at 107.

The lower court held that since there was no objection at trial to the failure to instruct, ". . . our standard of review is that dictated by the plain error rule, which allows reversal only if necessary to avoid a clear miscarriage of justice or to correct the deprivation of a substantial right." *United States* v. *Urbana*, 410 F.2d 1081.

But, "in the final analysis, it is not the parties who determine the charge the judge gives to the jury. The obligation rests squarely on the shoulders of the trial judge." *Lott* v. *United States*, 5 Cir., 218 F.2d 675, 680-681, fn. 7 (1955).

The holding by the Fifth Circuit in this case runs counter to the holdings by other circuits.

The absolute necessity of the court instructing the jury on the essential elements of the offense set out in the indictment has been recognized by the following circuits: *Kreiner* v. *United States*, 2 Cir. 11 F.2d 722, 731 (1926) ("In a criminal case a court should instruct on all essential questions of law involved in the case, whether requested or not."); *United States* v. *Noble*, 3 Cir., 155 F.2d 315, 316-7 (1946) ("We think it is self evident that a jury cannot perform its duty of determining the guilt or innocence of a defendant accused of a crime unless they know the essential elements of the crime which he is alleged to have committed".); *United States* v. *Hutchison*, 4 Cir., 333 F.2d

991 (1964) ("This court cannot and will not affirm a conviction by a jury unless the District Court instructs as to the elements of the offense charged in the information or indictment, whether requested or not: . . . The most important and essential part of instruction as to the law is the essential elements of the crime charged. There can be no substitute for such an instruction to the jury by the judge in the presence of counsel and the defendant."); *Samuel* v. *United States*, 9 Cir., 169 F.2d 787, 792 (1948) ("In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so."); *Miller* v. *United States*, 10 Cir., 120 F.2d 968, 972 (1941) ("In a criminal case, it is the duty of a court to instruct on all essential questions of law, whether requested or not."); *Tatum* v. *United States*, D.C. Cir., 190 F.2d 612, 615 (1951) ("Failure on the part of a trial court in a criminal case to 'instruct on all essential questions of law involved in the case, whether requested or not' would clearly 'affect substantial rights' within the meaning of Rule 52(b).").

It is admitted that trial counsel did not object to the court's instructions. This court should grant certiorari to determine whether the holding by the Fourth Circuit is applicable or whether the watered-down requirement of the instruction as now announced by the Fifth Circuit in this case is to be the rule. The Fourth Circuit states:

> "In every criminal prosecution, we have heretofore insisted an exposition of the constituents of the offense is mandatory and indispensible." *United States* v. *Harris*, 4 Cir., 346 F.2d 182, 185 (1965).

Conclusion

For the reason that the opinion in this case is contrary to the expressed opinion by this court and by the various other circuits, certiorari should be granted to review the issue.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26446

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SAM FRANK URBANA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(June 26, 1969)

Before BROWN, Chief Judge, GEWIN and GOLDBERG, Circuit Judges.

GEWIN, Circuit Judge: The appellant, Sam Frank Urbana, was convicted by a jury in the United States District Court for the Southern District of Florida on a two-count indictment which charged that he caused to be transported in interstate commerce two forged and falsely made traveler's checks, in violation of 18 U.S.C. §§ 2 and 2314 (1964).[1] He was sentenced to four years' imprisonment on each count, the sentences to run concurrently.

[1] Section 2314 provides in pertinent part:

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered,

Prior to the appellant's trial, the Government filed with the district court a "Memorandum of Information" which revealed that the United States had engaged in electronic surveillance of the appellant's activities. The Government submitted to the district court the transcripts produced by the surveillance. The court, after an *in camera* inspection, determined that the transcripts were not "arguably relevant to the prosecution at hand" and denied the appellant's request that they be made available for his inspection.

Subsequent to the proceedings below, the Supreme Court held in *Alderman* v. *United States* that "surveillance records as to which any petitioner has standing to object should be turned over to him . . . ."[2] The Court vacated the judgment of conviction, remanded the case to the district court, and set out the procedure to be employed by that court in dealing with the accused's request to inspect surveillance records. Accordingly, the judgment of conviction in the case now before us is hereby vacated and the case is remanded to the district court for compliance with the procedure prescribed in *Alderman*.

(Footnote 1 continued)

or counterfeit securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited . . .

. . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Section 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[2] ..... U.S. ..... (1969) [March 10, 1969].

Since, upon remand, a compliance with *Alderman* will culminate in either the district court's entering a new judgment of conviction or according the appellant a new trial, we think efficiency in the administration of justice demands that we consider the other assignments of error raised on this appeal.[3]

The appellant contends (1) that it was prejudicial error for the trial court not to instruct the jury on all the essential elements of the offenses charged and (2) that it was error for the court to deny the appellant's motion for a mistrial based on misconduct of the prosecutor. For the reasons discussed below, we hold that neither of these alleged errors requires reversal.

The Government offered evidence to prove that the appellant cashed two stolen American Express traveler's checks at stores in Miami, Florida and that, thereafter, the checks were received for payment at the American Express office in New York City. The theory of the appellant's defense was to establish that he was not the individual who cashed the checks. After all the evidence was in and the parties had rested, the court held a "charge conference" at which the prosecutor and defense counsel, in the presence of the appellant, discussed with the court the manner in which it should instruct the jury. At this conference, the court expressed the view that the evidence had created only one factual issue for jury determination, *viz.*, whether the Government had established beyond a reasonable doubt that it was the appellant who cashed the checks. The prosecutor and defense counsel concurred in this analysis of the evidence. Consequently, the court suggested that it would be appropriate to charge the jury

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[3] *See* Sec v. National Securities, Inc., ... U.S. ....., ..., 21 L.Ed.2d 668, 678-79 (1969); Miller v. International Paper Co., 408 F.2d 283, 288-89 (5th Cir. 1969).

that the only question it was to decide was whether the appellant had cashed the checks. It was agreed that this instruction, in addition to two instructions requested by defense counsel concerning impeachment of witnesses and failure of the accused to testify, and the standard instructions explaining such legalisms as reasonable doubt, presumption of innocence, and burden of proof would make up the court's charge to the jury.

The one-issue approach which defense counsel had agreed that the court should employ in its jury instruction was employed by defense counsel himself in his closing argument to the jury:

> Our position simply is as simple as this, and do not let counsel mislead you; there is only one issue before you — was Mr. Urbana the individual that gave those two witnesses those checks. It is as simple as that; and if you find and believe, and you are convinced beyond a reasonable doubt, find him guilty. It is just that simple.

Counsel emphasized this as the only issue and repeated the substance of the argument to the jury. He made the most of the strategy he had chosen. Following the closing arguments, the court charged the jury in the manner agreed upon at the conference and, upon completing the charge, asked if there were exceptions. Defense counsel stated that he had none.

The appellant now contends that the court committed reversible error by failing to enumerate in its instructions all the essential elements of the offenses charged in the indictment. Since there was no objection at trial to the matter now alleged as error, our standard of review is that dictated by the plain error rule, which allows re-

versal only if necessary to avoid a clear miscarriage of justice or to correct the deprivation of a substantial right.

The appellant cites cases in which this court has stated that the trial court must instruct on all essential elements of the offense.[5a] These decisions, however, do not preclude our determining whether, in the circumstances of the case, the court's failure properly to instruct amounts to plain error. It is undisputed that the court instructed [illegible] on the determinative issue in the case. The instructions unequivocally approved by defense counsel, coincided with the strategy employed by the defense throughout the trial. One element of the offenses, interstate movement of the checks, was stipulated to by defense counsel. [illegible] sential elements on which the court omitted instruction were conceded by defense counsel in his argument to the jury. Moreover, these elements were supported by uncontested evidence. We conclude that, in the peculiar circumstances of this case, the court's erroneous instruction was not plain error.[6]

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[4] Mims v. United States, 375 F.2d 135, 147 (5th Cir. 1967); Cook v. United States, 320 F.2d 258, 260 (5th Cir. 1963); [illegible] v. United States, 319 F.2d 404, 410 (5th Cir. 1963); Fed. Rules Crim. P. 30 and 52(b).

[5] Peterson v. United States, 344 F.2d 419, 428 (5th Cir. 1965); Williamson v. United States, 332 F.2d 123, 132 (5th Cir. 1964); Merrill v. United States, 338 F.2d 703, 707-08 (5th Cir. 1964). *See* Screws v. United States, 325 U.S. 91, 107 (1945); [illegible] United States, 218 F.2d 675, 680 n. 7 (5th Cir. 1955).

[6] Moreover, it may well be that the omissions in the jury instructions were harmless. *See* Harrington v. California, ... (1969). [No. 750 June 2, 1969].

The result we reach is not unlike the Fourth Circuit's holding in *United States* v. *Schmidt*.[7] We quote from Judge Winter's opinion:

> An examination of the transcript makes it clear that the only substantial issue submitted to the jury was an issue of identification. Two bank tellers and two bank customers testified, all to the effect that the bank had been robbed, and that the robber had worn a dark blue suit, sunglasses and a dark hat pulled down on his face; all four identified defendant as the robber. While their testimony differed as to the use of a weapon, defendant's counsel presented no defense testimony and was constrained to tell the jury in final argument "I will concede, and I think we all know, that the bank was robbed. Whoever did it did something he should not have done and he should be punished for it. I will concede that these people saw a man in there with dark . . . glasses and two paper bags and a gun. I will not concede that it was Dick Schmidt that they saw coming there." In this context, we cannot conclude that defendant's rights were so prejudiced by the district judge's failure to instruct in regard to the elements of the crimes that we should notice the error.[8]

Although the omissions in the court's instruction do not require reversal, if this case is retried, the court will instruct, of course, on all the essential elements of the offenses charged.

Next, we consider the appellant's contention that he was prejudiced by misconduct of the prosecutor. Upon direct examination by the prosecutor, an employee of a Miami store testified that a man, whom he identified in court as

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[7] 376 F.2d 751 (4th Cir. 1967).

[8] United States v. Schmidt, 376 F.2d 751, 753 (4th Cir. 1967). *See* United States v. Salliey, 360 F.2d 699, 702-03 (4th Cir. 1966); Lyons v. United States, 325 F.2d 370, 374-75 (9th Cir. 1963).

the appellant, entered the store and asked to see some shirts. The prosecutor then asked the witness: "Would you describe the manner of the defendant as he appeared to you?" Defense counsel objected to the prosecutor's referring to the individual who entered the store as the defendant, and the court instructed the prosecutor to rephrase his question. Continuing his examination of the witness, the prosecutor, shortly thereafter, again referred to the man under discussion as the defendant, asking the witness to state "what the defendant did or said." Defense counsel moved for a mistrial. The court denied the motion and instructed the jury that it should not consider as evidence the questions asked, but only the answers to the questions.

While we have held that it is improper for the prosecutor to state his personal opinion or to state facts not in evidence,[9] this record is free of any such impropriety which would require a mistrial. If the prosecutor's remarks were inappropriate, it is clear that the trial court's cautionary instruction obviated the error. The prosecutor's references to "the defendant" assumed nothing which had not been stated by the witness.

VACATED and REMANDED.

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[9] McMillan v. United States, 363 F.2d 165, 168-69 (5th Cir. 1966); Unn v. United States, 307 F.2d 883, 885-86 (5th Cir. 1962).

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit
OCTOBER TERM, 1968

No. 26446

D. C. Docket No. 67-528-CR-JE

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

SAM FRANK URBANA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, GEWIN and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated, and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

June 26, 1969

Issued as Mandate: July 28, 1969

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 199

SAM FRANK URBANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on a two-count indictment charging him with causing two forged and falsely made traveler's checks to be transported in interstate commerce, in violation of 18 U.S.C. 2314. He was sentenced to concurrent terms of four years' imprisonment on each count.

Petitioner appealed his conviction (Case No. 26446), raising three points of error: (1) failure of the trial judge to instruct the jury on all elements of the offenses charged, (2) misconduct of the prosecutor, and (3) governmental electronic eavesdropping.

The court of appeals, in an opinion rendered June 26, 1969 (412 F. 2d 1081), found that the first two contentions did not require reversal, but vacated the judgment and remanded the cause for a hearing with respect to the eavesdropping issue, pursuant to *Alderman* v. *United States*, 394 U.S. 165. After a hearing, the district court ruled that the eavesdropping in no way contaminated the evidence and entered a new judgment of conviction. Petitioner appealed (Case No. 28934). On March 9, 1970, he moved for an order allowing him to file a petition for rehearing with respect to the earlier decision and to consolidate that case with the present appeal. He expressly stated that he did not challenge the rulings on the eavesdropping question. The court denied that motion, and it is from this ruling that petitioner seeks certiorari.

While the court of appeals justifiably declined to reconsider matters which it had previously decided, we do not contest the right of petitioner to defer raising those issues on petition for a writ of certiorari until after the judgment which had originally been vacated by the court of appeals was reinstated and affirmed by the court of appeals. While technically this petition is premature, since the court of appeals has not finally acted on the appeal from the reinstated judgment,[1] the court of appeals has made clear that it intends to rely on its former opinion. We therefore treat the merits of the issue raised.

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[1] Petitioner has asked the court to rule on his appeal from the reinstated judgment and the government has moved to dismiss that appeal as frivolous.

Before giving its instructions to the jury, the trial judge held a conference in his chambers, attended by attorneys for the government, petitioner and his counsel. The court expressed its opinion, based on the evidence, that the sole factual issue to be decided by the jury was whether petitioner was the one who had cashed the checks. Defense counsel agreed (Tr. 199).[2] He requested only three instructions, one relating to burden of proof, another concerning impeachment of witnesses, and a third bearing upon the failure of petitioner to take the stand. All parties agreed that there was only one issue—identity—and that this, together with the instructions requested by petitioner's counsel, would constitute the only charges to be given the jury (Tr. 202-206).

During his closing argument, counsel for the defense stressed that identity was the only issue he wished the jury to consider, announcing (Tr. 230):

> Our position simple [*sic*] is as simple as this, and do not let counsel mislead you: there is only one issue before you—was Mr. Urbana the individual that gave those two witnesses those checks. It is as simple as that; and if you find and believe, and you are convinced beyond a reasonable doubt, find him guilty. It is just that simple.

The court then charged the jury in the manner agreed to by defense counsel, adding only that the indictment had been previously read to the jury and

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[2] We are lodging with the Clerk of this Court a copy of the relevant portions of the transcript of trial, and an excerpt of the proceedings during empaneling of the jury.

that a copy would be with them in the jury room (Tr. 259). At the conclusion of his charge, the district judge asked defense counsel if he had any objections to the instructions as given. Counsel replied that he had none (Tr. 268).

The court of appeals correctly concluded that, in the circumstances of this case, the district court's instructions did not constitute plain error (412 F. 2d 1081 at 1083). *United States* v. *Bard*, 408 F. 2d 347 (C.A. 6), certiorari denied, 396 U.S. 855; *United States* v. *Schmidt*, 376 F. 2d 751 (C.A. 4), certiorari denied, 389 U.S. 884; *United States* v. *Salliey*, 360 F. 2d 699 (C.A. 4); *Herzog* v. *United States*, 235 F. 2d 664 (C.A. 9), certiorari denied, 352 U.S. 844. Not only did petitioner's counsel fail to raise any objection to the instructions, even though he was afforded full opportunity to do so, he gave his approval of the charge as presented. Fed. R. Crim. P. 30. The indictment had previously been read to the jury, was incorporated by reference in the instructions, and was with the jurors during their deliberation. The jury was thus aware of the other elements of the offense, which were uncomplicated and not disputed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

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